IN THE

APR 29 1975

Supreme Court of the United States

October Term, 1975

No. 74 - 6288

EARTHIA WILEY,

Petitioner,

vs.

BRUCE McMANUS, WARDEN,
MINNESOTA STATE PRISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Minnesota Supreme Court affirmed the Appellant's conviction in State v. Wiley, 295 Minn. 411, 205 N.W.2d 667 (1973). The United States District Court for Minnesota denied Appellant's Petition for Habeas Corpus relief on the basis of the report and recommendation of the United States Magistrate. The opinion of the Eighth Circuit affirming the District Court was filed January 9, 1975, No. 74-1391. Neither the District nor the Circuit Court's opinions were reported.

JURISDICTION

The appellate jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Does federal Habeas Corpus extend to a state petitioner whose rights under the constitution have not been abridged.

2. Whether a search warrant affidavit based upon the heresay statement of an unnamed informant corroborated by independent investigation by the police gave probable cause to search the defendant's residence for narcotics, weapons, and items of identification.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law;"

United States Constitution, Fourth Amendment

". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On October 14, 1970, Minneapolis narcotics officer, Wallace Cecil received a call from a Minneapolis housing inspector. The housing inspector reported that he had observed a large

quantity of marijuana in a garage and on the porch roof of a house located at 4717 Fourth Avenue South in Minneapolis, Minnesota (T.*310, R.H.**4-5). Officer Cecil and another Minneapolis police officer immediately went to the residence, looked into the open garage and also observed the large amount of marijuana (R.H. 10-11). The house was put under surveillance. A check on the automobile parked in the driveway showed it to be registered to Patsy M. Harley and Earthia Wiley, the Petitioner.

On October 22, 1970, Officer Cecil met with an informant at the office of the Bureau of Narcotics and Dangerous Drugs. The informant stated that he had resided at 4717 4th Avenue South for the previous month, and that he had observed the Petitioner possess and sell marijuana. The informant further stated that a quantity of drugs and marijuana was in the house on that date. The informant gave officers a green leafy substance which he claimed to have taken from the Petitioner's room. A chemical test showed the substance to be marijuana. The informant gave details of his other observations of the Petitioner.

Officer Cecil obtained a search warrant which authorized him to seize from the residence:

> ". . . narcotic drugs and dangerous drugs including marijuana, LSD, amphetamines and barbiturates and items of identification to show constructive possession of above contraband such as rent receipts, utility bills, personal letters, and other personal I.D." (Petitioner's Exhibit A)

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* T. refers to trial transcript.
** R.H. refers to the first pretrial evidentiary hearing held on December 8, 1970.

Pursuant to the search warrant, officers of the Minneapolis Police Department entered the 4th Avenue residence on October 23, 1970. They seized in excess of twenty pounds of marijuana, primarily from the garage and the Petitioner's room. A number of items of Petitioner's identification were also seized from the room. (Petitioner's Exhibit A)

Petitioner was charged with the unlawful possession of marijuana and demanded a jury trial.

Defense counsel made a number of pretrial motions, including a motion to require the State to furnish an investigator to find "Juan Ricardo" (Respondent's Exhibit "A"), granted by the court January 15, 1971. He also made a motion to require the State to disclose the identityof the unnamed informer. The court denied this motion (R.H.D.***3). The Petitioner later acknowledged that neither he nor the State had been able to locate Ricardo (T. 11-12). At trial, the State introduced a number of items which tended, circumstantially, to establish that the Petitioner lived in the residence where the marijuana was found. These included a number of items of Petitioner's identification, and clothing taken from the bedroom. (R.H. 36-37, 84-85). The State also introduced admissions by the Petitioner that he lived there (T. 249, 314-315, 588), direct observations by police officers that he slept there with Miss Harley (T. 314, 294) and a statement by Miss Harley that the Petitioner was a "renter" (T. 249).

The Petitioner's defense was directed at establishing Juan Ricardo as the criminal, not himself. Attempting to prove this he introduced the testimony of Patsy Harley, who testified that she and Ricardo had processed and packaged the marijuana in her home (T. 454-456). She denied that the Petitioner

*** R.H.D. refers to transcript of the second suppression hearing held on December 8, 1970.

had any knowledge of the presence of marijuana (T. 459). Finally, Ms. Harley testified that it was her belief that Ricardo had informed the police of the presence of marijuana in her home in an attempt to "frame" the Petitioner (T. 507-508).

The jury returned a verdict of guilty and the court sentenced Petitioner to an indeterminate term not to exceed twenty years. The Petitioner was paroled on June 4, 1973, and is not currently incarcerated.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Respondent does not concede that the lower court's rulings on the informer issue were in any respects erroneous. However, for the purposes of this brief, the Respondent has elected not to reply on the merits. Argument on the issue is reserved in the event that Certiorari is granted.

I

FEDERAL COURTS WILL NOT EXTEND THE WRIT OF HABEAS CORPUS TO A STATE PETITIONER WHOSE RIGHTS UNDER THE CONSTITUTION HAVE NOT BEEN ABRIDGED.

Petitioner was not permitted at trial to question police officers about the identity of the unnamed informant who furnished the probable cause for the search warrant. He claims that this restriction was error, and while not citing any specific constitutional provisions, alleges that the trial court's ruling deprived him of a fair trial. Assuming that the court's ruling was error for the purposes of this argument, Respondent disagrees with Petitioner that the error was of constitutional

magnitude. Lacking a substantial constitutional basis for the claimed error, Federal courts are not empowered by 28 U.S.C. 2241(c)(3) to order Habeas Corpus relief.

Prior to trial on January 8, 1971, Petitioner filed a motion with the state trial court to require the state to furnish him with an investigator to find "Juan Ricardo." The Petitioner alleged that Ricardo had "continual and frequent access" to the house where the marijuana was found, that Ricardo harbored feelings of malice and ill-will toward him, and that Ricardo had possessed marijuana on several occasions. The Petitioner further stated that locating Ricardo would aid his defense. The court ordered a private investigator be furnished at the expense of the Public Defender (Appendix A). At the commencement of trial, the defense counsel admitted that neither he nor the state had been able to locate Ricardo (T. 12).

The Petitioner's defense was that he had been framed. His witnesses testified that Juan Ricardo and Petitioner had quarreled and fought. Subsequent to the argument, Ricardo brought marijuana into Patsy Harley's house where he was living at the time, and began "dealing." (T. 441-52). Ms. Harley told the jury that she believed that Ricardo had informed the police of the presence of his marijuana in her home in an attempt to "frame" the Petitioner (T. 507-508). The trial court's ruling that the defense could not corroborate Ms. Harley's belief through the State's witnesses, if error, was not of constitutional significance. The Petitioner was able to adequately present his defense to the jury.

Roviaro v. United States, 353 U.S. 53 (1957) holds that the prosecution must disclose the identity of an unnamed informant when the defense establishes that the disclosure

would be helpful to the defense. That holding is not on point with the current case, since the defense was aware of the identity of the informant before trial. Mr. Justice Burton does suggest as dicta that if the name of the informer is known to the defense, no prosecutorial evidentiary privilege exists (*Id.* at 60). However, it is clear from the comment and cases cited in footnote 8 that the Justice was speaking of evidentiary law, not constitutional principles.

The role of federal Habeas Corpus is not to serve as an additional appeal. *Gemmel v. Buchkoe,* 358 F.2d 338 (5th Cir. 1966), cert. den. 385 U.S. 962, reh. den. 385 U.S. 1021. Habeas Corpus "lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia,* 372 U.S. 391 at 423 (1963). The Petitioner has made an allegation of error in an evidentiary ruling which does not amount to a constitutional violation. The Writ of Habeas Corpus is not the appropriate method of relief.

II

A WARRANT AUTHORIZING A SEARCH FOR "ITEMS OF IDENTIFICATION TO SHOW CONSTRUCTIVE POSSESSION" AND GIVING EXAMPLES IS SUFFICIENTLY PARTICULAR TO BE CAPABLE OF REASONABLE EXECUTION.

On the basis of reliable information given to the police, a Municipal Judge issued a warrant authorizing a search for:

> "Narcotic drugs and dangerous drugs, including marijuana, LSD, amphetamines, and barbiturates and items of identification to show constructive possession of the above contrabands such as rent receipts, utility bills, personal letters, and other personal ID."

The Appellant asserts that the warrant does not state the items to be seized with sufficient particularity.

Mr. Chief Justice Burger, in the case of *United States v. Harris*, 403 U.S. 573 (1971) warns against the courts making too strict technical requirements of search warrants. He quotes with approval *United States v. Ventresca*, 380 U.S. 102 (1965):

> "[T]he Fourth Amendment's commands, like all Constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants such as the one here involved, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specifity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *Id.* at 108.

Petitioner does not claim that the police officers performed an unreasonable search, or that evidence was admitted not authorized by the warrant. He contends that if the warrant had been construed in another way, the officers *could* have conducted an overly broad search. Such an improper search was not conducted. The search warrant, construed reasonably in accordance with the Chief Justice's dictum, defined for the officers the areas they were to search and the evidence they were to search for.

A search warrant similar to the one in question was upheld in *United States v. Honore*, 450 F.2d 31 (9th Cir. 1971), cert. den. 404 U.S. 1048 (1972). There, the Appellant claimed that this phrase in the supporting search warrant was overly broad:

> "and articles, personal property tending to establish the identity [sic] of the persons in control of the premises, storage areas, or containers where the above listed property are located, consisting in part of and including but not limited to utility company receipts, rent receipts, cancelled mail envelopes, and keys". *Id.* at 33.

The court emphasized that the words "tending to establish the identity of the persons in control of the premises", was sufficient to identify the items to be seized. The phrase in the search warrant in the present case, "items of identification to show constructive possession of the above contraband" serves the same purpose.

The Respondent submits that the resolution of the issue by all of the courts below is consistent with this Court's prior rulings.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petitution for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

THE STATE OF MINNESOTA,

Plaintiff,

vs.

EARTHIA WILEY,

Defendant.

MOTION TO FURNISH INVESTIGATOR

Defendant Earthia Wiley, by and through his undersigned attorneys, hereby moves the Court to furnish the defendant, at the expense of the State of Minnesota, with the services of a private investigator for a period of one week commencing from the date of the hearing of this motion. This motion is based upon the following grounds:

1. The defendant is indigent and is unable to pay the costs of the services of an investigator.

2. The defendant believes, as more fully appears from the attached affidavit of the defendant, that one Juan Ricardo will be able to furnish evidence favorable to the defendant, but defendant's continuing and extensive efforts to locate the said Juan Ricardo have been unsuccessful.

3. Defendant believes, as more fully appears in the affidavit of the defendant attached hereto, that a number of persons had access at times material herein to the premises at 4717 4th Avenue South, Minneapolis, Minne-

sota, at which premises the State of Minnesota charges that the defendant unlawfully possessed marijuana, and the defendant further believes that said persons will be able to furnish evidence favorable to the defendant, but the defendant has been unable, despite continuing and extensive effort, to learn the identify of the said persons or to locate them.

4. Defendant believes, as more fully appears from the attached affidavit of the defendant, that the services of a professional investigator are necessary in order for the defendant to have any chance of locating the said Juan Ricardo, or of ascertaining the identity and whereabouts of persons who may have had access to the said premises at 4717 4th Avenue South, Minneapolis, Minnesota.

5. Unless the defendant is furnished with the services of an investigator, at the expense of the State of Minnesota, the defendant will be unable adequately to prepare and present his defense at trial herein, and the defendant's right to a fair trial and to the equal protection of the laws, as set forth in the United States Constitution, will have been abridged and denied.

This Motion is based upon all of the files and proceedings herein and upon the attached affidavit of Earthia Wiley.

Dated: January 8th, 1971.

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By Daniel R. Shulman
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STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

THE STATE OF MINNESOTA,

Plaintiff,

vs.

EARTHIA WILEY,

Defendant.

AFFIDAVIT

State of Minnesota
County of Hennepin — ss.

Earthia Wiley, being first duly sworn, deposes and says on oath as follows:

1. Affiant is the defendant herein and has been charged with, inter alia, unlawful possession of marijuana at premises located at 4717 4th Avenue South, Minneapolis, Minnesota.

2. A certain Juan Ricardo had continual and frequent access to the said premises at 4717 4th Avenue South at times material herein prior to the arrest of affiant for possession of marijuana at said premises.

3. Said Juan Ricardo had numerous altercations with affiant, and harbored feelings of malice and ill will towards affiant and on several occasions informed affiant, "I'll get you."

4. Said Juan Ricardo on several occasions had marijuana in his possession while in the presence of affiant.

5. Despite extensive and extensive and continuing efforts, affiant has been unable to learn the whereabouts or to locate the said Juan Ricardo since the date of affiant's arrest, and affiant believes that without the assistance of a professional

investigator affiant will be unable to locate the said Juan Ricardo prior to affiant's trial herein.

6. Affiant believes that if he is able to locate the said Juan Ricardo, the said Juan Ricardo will be able to present evidence favorable to affiant, or the said Juan Ricardo will lead affiant to evidence favorable to affiant.

7. A number of persons, whose names and whereabouts are unknown to affiant, had continuing and frequent access to the said premises at 4717 4th Avenue South at times material herein prior to the arrest of the defendant for possession of marijuana at the said premises.

8. Despite continuing and extensive efforts by affiant, affiant has been unable since the date of his arrest to learn the names and whereabouts of the said persons having access to the said premises at 4717 4th Avenue South, and unless affiant receives the services of a professional investigator, affiant believes he will be unable to learn the names and whereabouts of the said persons or to locate the same.

9. If affiant is able to learn the names and whereabouts of the said persons having access to the said premises at 4717 4th Avenue South and is able to locate the said persons prior to trial herein, affiant believes that the said persons will be able to furnish evidence helpful to affiant or will be able to lead affiant to evidence favorable to him.

10. Affiant is unable himself to pay for the services of a professional investigator for the reason that affiant is indigent.

. . . . . .

[Earthia Wiley]

Subscribed and sworn to before me this 8th day of January, 1971. — Sandra L. Schulz, Notary Public, Hennepin County, Minn. My commission expires June 9, 1977.

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

THE STATE OF MINNESOTA,

Plaintiff,

vs.

EARTHIA WILEY,

Defendant.

ORDER

The defendant having moved for an order requiring the State, at its own expense, to furnish the defendant not later than seven days prior to trial herein with a transcript of the proceedings of the Rasmussen Hearing herein, held on December 8, 1970; and the defendant further having moved to be furnished with the services of an investigator at the expense of the State of Minnesota; and said Motions having duly come on to be heard before this Court on the 12th day of January, 1971; and the court having considered the arguments of counsel, on all the files and proceedings herein,

IT IS ORDERED, that defendant's motions be, and they are hereby, granted, and, more particularly,

IT IS ORDERED, that the Office of the District Public Defender for the Fourth Judicial District herein be and the same hereby is required, at its own expense, to furnish the defendant at least seven days prior to trial herein with a transcript of the proceedings at the Rasmussen Hearing herein, held on December 8, 1970; and further

IT IS ORDERED, that the Office of the District Public Defender for the Fourth Judicial District be and the same hereby

is required, at its own expense, to pay for the services of a private investigator to be employed by the defendant, said payment by the said Office of the District Public Defender not to exceed in amount the sum of $100.00.

January 15, 1971

IRVING C. IVERSON
District Judge